

This is a claim for an August 1, 1997 accident and resulting back injury. The parties stipulated that claimant sustained a four percent whole body functional impairment as a result of that accident. While recovering from his back injury, claimant worked two nights

each week as a bartender for the Osaka Fantasy Steak House of Japan. After subtracting a credit for an overpayment of temporary total and temporary partial disability benefits, Judge Barnes awarded claimant permanent partial disability benefits in the net sum of \$939.45. Also, the Judge found that claimant's average weekly wage was \$192 (\$8 per hour x 24 hours) per week.

Claimant contends the Judge erred in computing his average weekly wage and the amount of credit that respondent and its insurance carrier are entitled to receive for the overpayment of temporary total and temporary partial disability benefits. Claimant argues that at the time of the accident he was expected to work at least 32 hours per week and that he was expected to work 40 hours per week after completing a three- or four-week training program. Therefore, he argues his average weekly wage is either \$256 (\$8 per hour x 32 hours) or \$320 (\$8 per hour x 40 hours). Additionally, claimant argues he earned only \$49.50 per week in his part-time job at the steak house, plus tips between \$5 and \$10 per week.

Conversely, respondent requests the Board to affirm the Judge's finding that claimant's average weekly wage was \$192 and find that claimant's part-time wages and tips at the steak house were \$109 per week, which would reduce the net award to \$794.64.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage?
2. For purposes of determining temporary partial disability benefits, how much did claimant earn per week working for the Osaka Fantasy Steak House?
3. What is the net award due claimant after deducting the proper amount of credit for overpayment of temporary total and temporary partial disability benefits?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

1. Mr. Ghaedsharafi injured his back on August 1, 1997, when he slipped and fell. The parties stipulated that the accident arose out of and in the course of Mr. Ghaedsharafi's employment with St. Louis Bread Company.
2. Mr. Ghaedsharafi was injured during his first week on the job. At the time of the accident, Mr. Ghaedsharafi was expected to work approximately 32 hours per week at \$8 per hour.
3. After the accident, Mr. Ghaedsharafi worked Friday and Saturday nights at the Osaka Fantasy Steak House. Based upon the pay stubs that were introduced into

evidence, the Board finds that at the steak house Mr. Ghaedsharafi earned approximately \$73 per week in salary and tips. Mr. Ghaedsharafi testified those pay stubs were representative of his earnings. Those stubs indicate that Mr. Ghaedsharafi earned salary and tips totaling \$438.01 during the six-week period between January 31, 1998 and March 14, 1998. Reducing that total to a weekly average yields \$73, which supports Mr. Ghaedsharafi's testimony that the steak house paid him a weekly salary of \$49.50.

4. The parties stipulated that St. Louis Bread Company and its insurance carrier paid \$2,232 in temporary partial disability benefits and \$1,280.10 in temporary total disability benefits while Mr. Ghaedsharafi was recovering from his back injury. Therefore, a total of \$3,512.10 has been paid to Mr. Ghaedsharafi in this claim.

5. The parties do not dispute the Judge's finding that Mr. Ghaedsharafi was entitled to receive one week of temporary total disability benefits and temporary partial disability benefits from August 15, 1997 to May 13, 1998, a period of 38.86 weeks. The only issue concerning those benefits is whether they were paid at the correct weekly rate.

#### CONCLUSIONS OF LAW

1. Mr. Ghaedsharafi's average weekly wage is \$256.

When a part-time worker is injured on the job before working at least one week, the average weekly wage is determined by considering all the evidence and circumstances. The Workers Compensation Act provides, in part:

. . . If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment. . .<sup>1</sup>

Mr. Ghaedsharafi's testimony that he was expected to work 32 hours per week at \$8 per hour during training is persuasive. Multiplying 32 hours by the \$8 yields an average weekly wage of \$256.

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<sup>1</sup> K.S.A. 44-511(b)(5).

2. Based upon a \$256 average weekly wage, the temporary total disability and permanent partial general disability rates are \$170.68 per week.<sup>2</sup>

3. The temporary partial disability rate is two-thirds of the difference between the average weekly wage that the worker was earning as of the date of accident and the amount the worker is earning after the accident.<sup>3</sup> Two-thirds of the difference between \$256 and \$73 yields a temporary partial disability rate of \$122.

4. The Board concludes that Mr. Ghaedsharafi is entitled to receive \$170.68 in temporary total disability benefits and \$4,740.92 (\$122 x 38.86 weeks) in temporary partial disability benefits.

5. Mr. Ghaedsharafi is entitled to receive \$2,739.41 in permanent partial general disability benefits.

When computing the permanent partial general disability weeks, the temporary partial weeks are first converted to 27.78 (\$4,740.92 divided by \$170.68) weeks of temporary total disability benefits and then added to the one week of temporary total disability benefits that was ordered paid for a total of 28.78 weeks. The number of temporary total disability weeks greater than 15, or 13.78, are then subtracted from the 415-week maximum yielding 401.22 weeks (415 - 13.78 = 401.22). When 401.22 weeks is multiplied by four percent, the product is 16.05 weeks.<sup>4</sup> Therefore, Mr. Ghaedsharafi is entitled to receive 16.05 weeks of permanent partial general disability benefits at \$170.68 per week, or \$2,739.41.

6. St. Louis Bread Company and its insurance carrier are entitled to a credit for any benefits that they have previously paid to Mr. Ghaedsharafi.

7. Based upon the above, Mr. Ghaedsharafi is entitled to receive \$170.68 in temporary total disability benefits, \$4,740.92 in temporary partial disability benefits, and \$2,739.41 in permanent partial general disability benefits, for a total award of \$7,651.01. Subtracting the \$3,512.10 in temporary partial and temporary total disability benefits that have previously been paid, the net award to Mr. Ghaedsharafi is \$4,138.91.

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<sup>2</sup> See K.S.A. 44-510c(b)(1) and K.S.A. 1997 Supp. 44-510d(a).

<sup>3</sup> K.S.A. 44-510e(a).

<sup>4</sup> See K.S.A. 44-510e(a).

**AWARD**

**WHEREFORE**, the Appeals Board modifies the January 25, 1999 Award to grant Mr. Ghaedsharafi a net award of \$4,138.91, which is presently due and owing and ordered immediately paid in one lump sum.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mansour Ghaedsharafi, 2120 N. Old Manor #305, Wichita, KS  
Kirby A. Vernon, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
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